

NTSB Order No.
EM-141

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 14th day of April, 1987

PAUL A. YOST, Commandant, United States Coast Guard

v.

JACK P. LYONS, Appellant.

Docket: ME-125

OPINION AND ORDER

On October 3, 1986, a Coast Guard Administrative Law Judge sustained a charge of misconduct against the appellant on finding proved a specification alleging that he had on November 25, 1985, while serving as Pilot aboard the M/V Federal Calumet, "wrongfully direct[ed] the movement of said vessel in St. Louis Bay, Superior, WI while under the influence of an intoxicant." The law judge thereupon suspended appellant's merchant mariner's license and document for one year outright and for an additional three months on eighteen months' probation. On October 22 the law judge denied appellant's written request for a temporary license pending his appeal of her decision to the Commandant. The Vice Commandant, acting by delegation, affirmed the denial of the temporary license on December 10, 1986.¹ The instant appeal challenges only the Coast Guard's denial of a temporary license; the appellant's appeal on the merits of the law judge's finding of misconduct is currently pending before the Commandant.² For the reasons that follow, we have determined that the decision to deny appellant a temporary document pending appeal must be reversed.

We have only once before had occasion to review the denial of a temporary document pending appeal to the Commandant. In that instance we concluded that the Commandant had not satisfied his

¹Copies of the ordered of the law judge and the Vice Commandant with regard to the request for a temporary license are attached.

²The Coast Guard has filed a reply opposing appellant's appeal.

obligation, under the Administrative Procedure Act, to explain why the seaman was ineligible for a temporary document under the applicable regulatory standard.³ See Commandant v. Amoury, NTSB Order EM-94 (1981). This case involves the same kind of deficiency.

With one exception not relevant here, 46 CFR § 5.707(a) confers on any "person who has appealed from a decision suspending outright or revoking a license, certificate or document" the right to apply for a temporary license, certificate or document for use during the appeal's pendency.⁴ The grant or denial of the application is based on "consideration [of] whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws" (46 CFR 5.707(c)). As to certain offenses, the regulation establishes that incompatibility with safety at sea may be presumed and that, therefore, a temporary document or license may be denied "for that reason alone" whenever one of those offenses has been found proved.⁵ Id. Inasmuch as misconduct based on operating a vessel while under the influence of an intoxicant is not one of the offenses giving rise to a presumption of incompatibility with requirements for safety at sea under the regulation, the Coast Guard must do more than state that offense to justify the denial of a temporary license. It did not do more than that here.

The law judge denied the request for a temporary license on the ground that evidence submitted at the hearing showed that the appellant had "been charged on three occasions for driving a motor vehicle while under the influence of intoxicants, the third

³Section 555(e) of the APA (5 USC 555(e)) requires that an agency rejection of an application be accompanied by a brief statement of the grounds for denial.

⁴The right is not extended to those whose licenses, certificates or documents have been revoked for drug offenses for which revocation is mandatory under 46 CFR § 5.59.

⁵The presumption of incompatibility applies to the acts or offenses set forth in 46 CFR § 5.61(a). They are (1) assault with a dangerous weapon, (2) misconduct resulting in loss of life or serious injury (3) rape or sexual molestation, (4) murder or attempted murder, (5) mutiny, (6) perversion, (7) sabotage, (8) smuggling of aliens, (9) incompetence, (10) interference with master, ship's officers, or governmental officials in performance of official duties, and (11) wrongful destruction of ship's property.

occasion being one out of which the Coast Guard hearing arose."⁶ The Vice Commandant, in affirming that decision, asserted (Decision at 3) that "[w]ithout regard to any prior incidents, the fact that a federally licensed pilot was found to have been operating a merchant vessel while under the influence of an intoxicant is sufficient to uphold the denial of a temporary license."⁷ While we recognize, of course, the threat to safe navigation posed by an intoxicated pilot, the issue before us is not whether appellant should serve a sanction for a serious breach of maritime safety standards, but whether he should be forced to serve a sanction before his right to defend against the charge has been exercised fully.⁸

The Coast Guard is free to adopt, through appropriate notice and comment rulemaking procedures, a rule that makes vessel operation while intoxicated one of the offenses that once found proved by a law judge will support the perfunctory denial of a temporary license. In the absence of such a rule, the Coast Guard, under its existing regulations and relevant statutes, must explain in each instance in which a request for a temporary license is denied the basis for its conclusion that the grant of the request would be "incompatible with requirements for safety at sea". On remand the Coast Guard must either provide such an explanation or issue a temporary license as requested by appellant.

⁶Local police officers, responding to a report that a car it was later discovered had been driven by appellant had been involved in a minor accident, followed appellant to the Federal Calumet. Although one of the two officer's on talking to appellant at the time believed him to be intoxicated, it does not appear that any objection was made or concern raised with respect to his intention to pilot the vessel. Appellant was not charged by the police officers until after the vessel had been moved from one grain elevator to another, a movement that appears to have consumed more than two hours.

⁷Appellant objects to the law judge's reliance on the motor vehicle charges on both relevancy and due process grounds. Assuming relevancy, we agree that it is inappropriate to rely on "charges" whose ultimate disposition is not reflected in the record. One of the two motor vehicle charges had occurred in 1980, the other in 1982.

⁸In this connection we note that the record contains no suggestion or indication that appellant's continued use of his mariner's license during the nearly one year period between the incident and the hearing had been attended by a repetition of any conduct such as that charged in this proceeding.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is granted,
2. The denial of appellant's request for a temporary license is reversed, and
3. The proceeding is remanded to the Coast Guard for action consistent with this opinion and order.

BURNETT, Chairman, GOLDMAN, Vice Chairman, LAUBER and NALL, Members of the Board concurred in the above opinion and order.